



Control Number: 51812



Item Number: 121

Addendum StartPage: 0

PROJECT NO. 51812

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2021 MAR 10 AM 11:13

ISSUES RELATED TO THE STATE §
OF DISASTER FOR THE FEBRUARY §
2021 WINTER WEATHER EVENT §

BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS
FILING CLERK

REQUESTS FOR COMMISSION ACTION AND RELIEF

For the reasons stated below, Young Energy, LLC dba Payless Power, requests that the Commission enforce its Orders of February 15 and February 16, and immediately implement all of the IMM’s recommendations, and provide other relief as described below.

Background Facts

- On February 15 and 16, 2021, the Commission entered two emergency orders setting the price for energy at the high system-wide offer cap (HCAP) of \$9000 per megawatt hour.¹ (These actions are hereafter referred to as the \$9000 orders or \$9000 pricing.)
- The intent of the two orders was that the \$9000 pricing would only be in place during load shed periods.²
- It was not the intent for the price to remain in place for four or five days as testified by former Chairwoman DeAnn Walker and quoted below.
- ERCOT did not stop the \$9000 scarcity pricing when load shed stopped at 11:55 pm on February 17. Instead, eight (8) hours later, ERCOT issued a notice advising that the \$9000 wholesale price would continue during the Level 3 Energy Emergency Alert (EEA3).³ The \$9000 pricing continued until February 19 at 9:27 am.

¹ PUC Docket 51617, “Order Directing ERCOT to Take Action and Granting Exception to Commission Rules,” dated February 15, 2021, (hereafter “February 15 Order”) and “Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules,” (hereafter “February 16 Order”).

² The February 15 Order at pages 1-2 says: “Energy prices should reflect scarcity of the supply” and states that “**IF** customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.” (Emphasis added.) ERCOT is directed to “ensure that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals.” The February 16 Order at page 2 directs ERCOT “to ensure that **firm load that is being shed** in EEA3 is accounted for in ERCOT’s scarcity pricing signals.” (Emphasis added.)

³ An EEA3 event is declared if operating reserves cannot be maintained above 1,375 MW. If conditions do not improve, continue to deteriorate or operating reserves drop below 1,000 MW and are not expected to recover within 30 minutes, ERCOT will order transmission companies to implement rotating outages.

121

- ERCOT violated the Commission Orders by associating the \$9000 price with the pendency of the Level 3 Energy Emergency Alert (EEA3) instead of periods of firm load shed. **The EEA3 notice can remain in effect even when load shedding is not occurring.** In this instance, EEA3 remained in effect for an additional 32 hours after load shedding had ended. Per the Commission Orders, **the moment load shedding ended, ERCOT had a duty to stop the price adder and reprice the intervals where load shedding was not occurring.**

Relief Requested

The Commission should immediately:

1. Enforce its Orders of February 15 and 16 and implement all three of the IMM's recommendations by directing ERCOT to act by a specified date;
2. Waive, revise and/or extend ERCOT Protocols so that payments of affected billings can be withheld until appropriate billing adjustments are made; and
3. Direct ERCOT to refund over-payments already made.

After enforcing its two Orders of February 15 and 16 by ordering ERCOT to immediately implement the three IMM recommendations, the Commission should review all billings for the *entire* period of the black swan weather event of February and order ERCOT to reprice and rebill as appropriate. Any ERCOT Protocols or Commission rules that hinder this process or force payments for the stratospheric amounts before conclusion of this review should be waived, extended or modified as needed.

Argument and Authorities

The \$9000 pricing was only intended to apply during periods of load shedding. In her testimony to the Senate Committee on Business & Commerce, former Commission Chairwoman DeAnn Walker stated: "I don't think when the 9000 was adopted that anyone that adopted it or argued for it at the time envisioned having it in place for four or five days, and so I think we have

to look at that.”⁴ Also at the same hearing, there was the following exchange:

Senator Nathan Johnson: Before last week, what is the longest period of time the wholesale electricity clearing price was sustained at the cap?

Chairwoman Walker: It was probably last uh not this past summer but the summer before either in August either 13 or 15 and it was nowhere near this—

Senator Johnson: Was it about 8 hours?

Chairwoman Walker: I don't remember the hours from then—

Senator Johnson: Less than a day?

Chairwoman Walker: Absolutely.

Senator Kelly Hancock: Senator Johnson, let her complete her statement though, if you would

Chairwoman Walker: This is one of the issues I think we have to look at because the 9000 was not intended to be in this situation.

Senator Johnson: Reading my mind. How many hours was the cap in place last week?

Chairwoman Walker: I don't know that figure.

Senator Johnson: Was it—

Chairwoman Walker: I believe I saw a figure of load shed at 70.5 hours.⁵

The Independent Market Monitor (IMM)⁶ has provided three recommendations to address the wrongful \$9000 pricing beyond load shed periods. In a statement issued March 8, 2021, Lieutenant Governor Dan Patrick urged acceptance of these recommendations saying:

“The IMM has recommended that the PUC exercise their authority to direct ERCOT to correct both these pricing errors, but they have declined to do so. ERCOT has a procedure for correcting pricing errors, but has also declined to act so far.”

“According to the ERCOT Nodal Protocol Section 6.3 (6) (a), ERCOT has 30 days from the event to correct errors in pricing. Today I am calling on both the PUC and

⁴ Testimony of Chairwoman DeAnn Walker, before the Senate Committee on Business & Commerce, at 6:28:07-6:28:24 (Feb. 25, 2021), *available at* https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15392.

⁵ *Id.* at 7:33:28-7:34:33.

⁶PUC Rule 25.503(k) provides in part: The duties and responsibilities of the Reliability Monitor may include, but are not limited to: (1) Monitoring, investigating, auditing, and reporting to the commission regarding compliance with reliability-related ERCOT procedures, including Protocols, Operating Guides, and Other Binding Documents, the reliability-related provisions of the commission's rules, and reliability-related provisions of PURA by market entities; (2) Providing reliability-related subject-matter advice, expertise, and assistance to the commission in the conduct of the commission's oversight and enforcement activities; and (3) Providing expert advice, analysis, reports, and testimony services relating to the Reliability Monitor's analysis and findings as part of the commission staff's case in enforcement proceedings.

ERCOT to follow the recommendations of the IMM and correct these mistakes. Correcting this \$16 billion error will require an adjustment, but it is the right thing to do. It will ultimately benefit consumers and is one important step we can take now to begin to fix what went wrong in the storm.”⁷

In a letter to the Commission, Senator Drew Springer explained the real world impact of the IMM’s recommendations: “Revising this pricing would mean significant savings for a number of commercial/industrial customers, municipalities, and cooperatives who are facing extremely high costs from the PUC’s actions.” Senator Springer argued that the Commission must, as a minimum, immediately implement the IMM recommendations “to ensure Texans may continue to not only keep their lights on, but in order to keep the economy going.”⁸

The Commission has ample statutory authority to implement all three of the IMM’s recommendations. PURA §39.151(d) gives the Commission complete authority over ERCOT. Also, notably, PURA §35.004(e) provides:

The commission shall ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive. In this subsection, ‘ancillary services’ means services necessary to facilitate the transmission of electric energy including load following, standby power, backup power, reactive power, and any other services as the commission may determine by rule.

The Commission’s rules contain additional authority to act. Rule 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market **unless otherwise directed by the Commission**. Additionally, Rule 25.503(j) provides: “ERCOT shall apply pricing safeguards to protect against market failure, including market power

⁷ Available at <https://www.ltgov.texas.gov/2021/03/08/lt-gov-dan-patrick-calls-on-ercot-to-correct-16-billion-error-during-storm/>.

⁸See letter of Senator Drew Springer filed herein on March 5, 2021.

abuse, **consistent with direction provided by the Commission.**”

While the Commission has already agreed with the IMM’s Recommendation #2 concerning “failure to provide” settlement treatment for all ancillary services (AS) that were not provided in real time, ERCOT has yet to implement the Commission’s “Order Addressing Ancillary Services” that was issued herein on March 3, 2021. So now ERCOT should be given a deadline.

The Commission has left pending a decision on IMM Recommendation #1 to reprice all day-ahead ancillary services (AS) clearing prices to cap them at the System-Wide Offer cap (SWCAP) of \$9,000 per MWh.⁹ This recommendation should likewise be implemented so that AS pricing complies with the Commission’s Orders of February 15 and 16. The IMM explained:

Capping the AS Market Clearing Prices for Capacity (MCPC) for each AS for those days will produce outcomes more consistent with economic market design principles. Since reserves are procured to reduce the probability of losing load, such principles dictate that the value of reserves cannot ...exceed the value of lost load (VOLL), which is equal to the SWCAP of \$9,000.¹⁰

The Commission’s initial reluctance to implement IMM Recommendation #3 should be revisited. Per that recommendation, the Commission should direct ERCOT to correct the real-time prices for the 32 hour period when load shedding did not occur. The IMM recognized that while pricing revisions may not be ideal, the prices that resulted from ERCOT actions were “inconsistent with ERCOT’s protocols and the Commission Order and ... allowing them to remain will result in substantial and unjustified economic harm.”¹¹

⁹ See letter of Carrie Bivins, VP, ERCOT IMM Director, March 1, 2021, filed herein.

¹⁰ *Id.* at page 1.

¹¹ See letter of Carrie Bivins, VP, ERCOT IMM Director, March 4, 2021, filed herein at page 2.

None of the IMM's recommendations constitute a retroactive shift in the rules since the only applicable "rules" with force and effect of law are the two Commission Orders of February 15 and 16. Those Orders did not authorize ERCOT's independent action to continue the \$9000 pricing through an extended period of the Level 3 Energy Emergency Alert (EEA3) and well beyond load shedding.

To the extent that market participants relied upon an ERCOT notice issued on February 18 7:46 am,¹² they did so at their own risk. Market participants were clearly aware of the content of the two Commission orders – including the Commission's statements in both orders that Utilities Code §39.151(d) gives the Commission "complete authority" over ERCOT. In fact, the February 18 ERCOT notice even provided links to those orders. Furthermore, the ERCOT notice was issued almost eight hours after ERCOT had notified market participants that load shedding had ended. Market participants, then, knew or should have known that the ERCOT notice was contrary to the Commission Orders of February 15 and 16 and that ERCOT's leaving the \$9000 price in place after the end of load shedding violated those Orders.

In *JP Morgan Chase Bank v. Orca Assets*, the Texas Supreme Court held that reliance must be justified.¹³ In that case, the Court described the party claiming reliance as being composed of experienced and knowledgeable businesspeople who negotiated an arms-length transaction and then "placed millions of dollars in jeopardy – all while operating under circumstances that similarly situated parties would have regarded as imminently risky."¹⁴ Similarly, ERCOT market participants are sophisticated businesses who had knowledge that the Commission (i) had tied the

¹² Available at http://www.ercot.com/services/comm/mkt_notices/archives/5225.

¹³ *JP Morgan Chase Bank v. Orca Assets*, 546 S.W.3d 648, 654 (Tex. 2018).

¹⁴ *Id* at 660.

\$9000 order to the time periods when customer load was being shed and (ii) had not authorized ERCOT to continue that scarcity pricing for a minute longer.

The IMM's recommendations do not constitute a retroactive shift in the rules since the only applicable "rules" with force and effect of law are the two Commission Orders of February 15 and 16 – not a contrary notice from ERCOT issued without Commission authority. The fact that some market participants chose, without reasonable basis, to engage in transactions outside the control of the Commission does not mean the Commission has an obligation to act to protect their interests. As Chairman D'Andrea recognized at the March 5th open meeting, market participants were free to use the public information regarding electricity prices being set for the 32 hour period in question in any manner they chose. The fact that some market participants chose to engage in risky trades on the Intercontinental Exchange was simply their choice.

So where do the equities lie? Should consumers and those entities who provide their retail service be left with the bill for ERCOT's error and contravention of Commission Orders which clearly tied scarcity pricing adjustments to periods of load shedding? Surely not.

Conclusion

For the reasons stated above, the Commission should order ERCOT to immediately - and by a specified date - implement all three recommendations of the IMM. The Commission should further order ERCOT to modify or suspend any of the ERCOT Protocols as may be necessary to implement the IMM's recommendations in the manner suggested by the IMM and provide such other and further relief as may be reasonable and necessary.

The Commission should not stop there. Billings for the *entire* period of the black swan weather event of February should be examined, and then re-priced and re-billed as appropriate. Any ERCOT Protocols or Commission rules that hinder this process or force payments for the

stratospheric amounts now, and before conclusion of the Commission's review, should be suspended modified as needed.

Respectfully Submitted,

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ATTACHMENT A - TIMELINE

February 15	Emergency Commission open meeting is held after ERCOT reports that energy prices are clearing at lower than \$9000 which is the system-wide offer cap. Resulting Commission Order says “energy prices should reflect scarcity of the supply” and states that “ IF customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.” Use of the high system-wide offer cap (HCAP) of “\$9000 per MWh and \$9,000 per MW per hour” is authorized for load shedding periods.
February 16	Commission issues second order directing ERCOT “to ensure that <i>firm load that is being shed</i> in EEA3 is accounted for in ERCOT’s scarcity pricing signals.”
February 16 at 10:00	Deadline for bids and offers into the Day Ahead Market (DAM) to be submitted to ERCOT systems for the next day. Bets are made that \$9000 HCAP will continue into February 17.
February 17 at 10:00	Deadline for bids and offers into the DAM to be submitted to ERCOT systems for the next day. Bets are made that \$9000 pricing will continue into February 18.
February 17 at 23:55	ERCOT recalls the last firm load shed instructions but did not discontinue the \$9000 pricing in contravention of Commission Orders of Feb 15 & 16.
February 18 at 07:46	<i>Almost 8 hours after load shedding had stopped</i> , ERCOT issues a notice explaining that in accordance with Commission Orders, it had implemented a change to its scarcity pricing mechanism on February 15, to better “ensure that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals.” The notice provided the two Commission orders as links. Without Commission authorization, the notice advised that the \$9000 pricing was continuing past the end of load shed and for so long as the Level 3 Energy Emergency Alert (EEA3) remained in place. http://www.ercot.com/services/comm/mkt_notices/archives/5225
February 18 at 10:00	Deadline for Bids and offers into the DAM to be submitted to ERCOT systems for the next day. Bets are made that the \$9000 HCAP will be in effect on February 19.
February 18	According to a March 8, 2021 Statement issued by Lieutenant Governor Dan Patrick, the IMM contacted ERCOT “on Thursday, February 18, to inform them their pricing was incorrect, but ERCOT ignored their recommendation.” https://www.ltgov.texas.gov/2021/03/08/lt-gov-dan-patrick-calls-on-ercot-to-correct-16-billion-error-during-storm/
February 19 at 09:27	ERCOT issues notice that it exited Energy Emergency Alert Level 3 at 9:00 am and at 9:05 am discontinued the \$9000 pricing – 32 hours after load shedding had stopped . http://www.ercot.com/services/comm/mkt_notices/archives/5228